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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 768

JOSEPH SALARDINO, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF COLORADO, *Respondent.*

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

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PREFATORY STATEMENT

We deem the statement of facts contained in petitioner's brief to be substantially conclusory. We, therefore, deem it necessary to set forth a complete statement of ultimate fact, even though it may be to some extent repititious. The references to the record are to the folio not the page, since the state record has been filed in this court and is not presently available to respondent.

SUPPLEMENTAL STATEMENT

At the time the grand jury proceedings were initially commenced, two investigators, Kechter and Hawley, were present (R., f. 30). The two investigators were introduced to the grand jury and introduced as being available to assist the grand jury (R. f. 33). The grand jury was instructed by the court that witnesses were to appear before the grand jury singly and without the presence of any other person except the district attorney and one assistant (R., f. 51). The investigators were present at the time the grand jury was ordered into session, which occurred within the view of the court.

Pursuant to subpoena, the petitioner Salardino appeared before the grand jury on Thursday, August 29, 1963 at 11:50 P.M. Petitioner responded to the first two questions which were, what is your name and address. The next question asked was, " Is your nickname 'the Ram'?" The petitioner refused to answer on the basis of his privilege against self-incrimination. The next question was, "And is that going to be your response to all questions from here on out?" Answer, "I refuse to answer any questions and all questions." Thereupon, the district attorney stated the he would ask questions which would not incriminate him, adding, "Of course, you have that right, which we respect." Petitioner was next asked, are you married, do you have children, do you know a Lieutenant Borden of the Denver police department, and are you employed. The petitioner refused to answer any and all of these questions. The district attorney then stated that the answers were unacceptable and constituted a deliberate attempt to obstruct justice. Whereupon, the witness was instructed to appear before the district court in the morn-

ing at 9 A.M., when the court would be asked to hold the petitioner in contempt. (See R., Exhibit D).

The petitioner appeared before the court at 9:10 Friday, August 30, 1963. Petitioner's counsel asked for a continuance until 1:30 in the afternoon, which was granted (R., f. 82). The petitioner next appeared before the court at 1:50 in the afternoon. Petitioner's counsel again requested a continuance in order to have additional opportunity to consult with his client. A continuance until Tuesday, September 3rd, was granted (R., f. 86).

At the commencement of the hearing, the trial court directed the exclusion of all persons who had no direct connection with the case, to which direction petitioner interposed no objection. The next hearing was held at 9:40 A.M., Tuesday, September 3, 1963. At the outset, the court stated that the purpose was to determine whether the petitioner was in contempt. The court directed the grand jury reporter to read the questions and answers, which was accomplished (R., f. 90). The court then asked the petitioner whether, if he were directed to answer the questions before the grand jury, would his response be the same, to which the petitioner answered in the affirmative (R., f. 90). The court stated that, "when the questions are not incriminating, they must be answered and that is the ruling here" (R., f. 95). The petitioner was thereupon found in contempt.

ARGUMENT

We will respond to the questions presented in the same order set forth by petitioner.

"The Witness Was Never Given A Clear-cut Choice In That He Was Never Ordered By The Court To Answer Any Question."

This "question presented" is difficult to respond to, since it is not supported by ultimate fact, but only by petitioner's self-serving conclusion.

A cursory review of the ultimate facts reveals the pellucid dissimilarity between this case and *Quinn v. U. S.*, 349 U. S. 155, 99 L.Ed. 946, 75 S.Ct. 668 (1954), relied on by petitioner, assuming, arguendo, that its teachings are applicable to state proceedings.

At the conclusion of petitioner's blanket refusal to answer any questions, he was directed by the district attorney to appear before the district court for the purpose of determining whether or not he was in contempt. When the hearing was held, after two continuances upon request of petitioner's counsel, the court stated at the outset that the purpose of the hearing was to determine whether or not the petitioner was in contempt. The court then inquired of the petitioner to the effect that, if he were directed to answer the questions before the grand jury, would his response be the same. The petitioner answered the inquiry in the affirmative. The court thereupon stated that, "when the questions are not incriminating, they must be answered and that is the ruling here."

The choice between compliance and non-compliance, and thereby risking appropriate punishment for non-compliance, could not be more "clear-cut."

"The Witness Was Never Advised Of His Rights While In The Grand Jury Room."

The relevancy of this point to the judgment of contempt under consideration is obscure. We are not here concerned with a criminal proceeding based in whole or part upon inculpatory testimony of the petitioner before a grand jury. Since petitioner fails to develop, argue, or support this "question" or otherwise frame it as a justiciable issue, we treat it in the same manner. More elemental is the fact that this issue was at no time presented to the trial court, and is therefore not properly before this court for the reason stated in our response to question four.

"The Witness Was Interrogated Before The Grand Jury In The Presence Of Prosecution Investigators Who Were Not Sworn And Whose Presence Was Unauthorized"

This "question" is equally obscure to the instant case. Firstly, although the presence of the investigators was not specifically ordered, it cannot be said, under the circumstances presented, that their presence was "unauthorized". Assuming, arguendo, that their presence was "unauthorized", what legal effect does such fact have on the judgment of contempt? The only known legal effect is in support of a motion to quash the indictment when an unauthorized person is present during the taking of evidence and deliberations of the grand jury which results in

the return of an indictment. Such is the minority rule. The better reasoned rule is that the presence of an unauthorized person under such circumstances, when the person is a public officer, does not nullify the indictment unless prejudice is shown. See annotation 4 ALR 2d 392. In no event does such fact nullify or destroy the jurisdiction or authority of the grand jury, which is the only legal result which would grant petitioner refuge in the instant case. Repetitiously, this question was not in any manner presented to the trial court.

> *"The Witness Was Subjected To Summary In Camera Proceedings In Which The Court Did Not Discuss The Nature Of Any Specific Question Asked By The Grand Jury And Imposed A Contempt Sentence Without Making Any Order Directing The Witness To Answer."*

In support of the fourth question, petitioner relies wholly on this court's decision in *In Re Oliver,* 333 U. S. 257, 92 L.Ed. 682, 68 S.Ct. 499 (1948). The nature of the proceedings which incurred the umbrage of this court in *Oliver* was a grand jury proceedings which transformed into criminal proceedings instanter without benefit of counsel, knowledge of the nature of the charges, or basis thereof, right of confrontation or right to present evidence. Added to this was the refusal to supply a verbatim transcript of the grand jury proceedings resulting in the judgment of contempt. None of these factors exist in this case. Although alluding to the right of public hearing, as indicated by this court, it was not called upon to determine the nature or extent of a person's right to a public trial in a state proceeding. Nor is this court called upon to so define in this case.

In Colorado, the extent of the right to a public hearing is clearly delineated. Indiscriminate exclusion of the public is prohibited. *Thompson v. People,* ..... Colo. ....., 399 P.2d 776 (1965). It goes without question, however, that such right may be waived by failure to object to the court's exclusionary order. *Benedict v. People,* 23 Colo. 126, 46 P. 437 (1896). In addition, failure to object forecloses review by the Colorado Supreme Court on writ of error. *Phelps v. People,* 152 Colo. 467, 382 P.2d 995 (1963); *Parrott v. People,* 144 Colo. 587, 357 P.2d 634 (1960); *Davis v. People,* 112 Colo. 452, 150 P.2d 67 (1944). The "question presented" was not properly before the Colorado Supreme Court, and it is, therefore, not justiciable in this court on certiorari, since no judgment of denial exists for review by this court. Additionally, since the question presented was properly not passed upon by the Colorado Supreme Court, the judgment is supported by an independent non-federal basis. *Cramp v. Board of Public Instruction,* 368 U. S. 278, 7 L.Ed. 2d 285, 82 S.Ct. 275 (1961).

CONCLUSION

As to the first question presented, the decision of the Colorado Supreme Court is in harmony with the pronouncements of this court. The second and third questions raise no relevant legal issue. The fourth question is adversely disposed of on an independent non-federal ground. The petition for a writ of certiorari must be denied.

Respectfully submitted,

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